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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

MILWAUKEE BREWERY WORKERS' PENSION PLAN,
Petitioner,
v.
JOS. SCHLITZ BREWING CO.
and THE STROH BREWERY CO.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS AS AMICUS CURIAE SUPPORTING PETITIONER

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BRIEF FOR THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS AS AMICUS CURIAE SUPPORTING PETITIONER

CONSENT OF PARTIES

This brief is being submitted with the consent of all parties pursuant to Rule 37.3 of the Rules of this Court. Letters of consent are being filed separately.

INTEREST OF AMICUS CURIAE

This brief is filed by the National Coordinating Committee for Multiemployer Plans ("NCCMP") as amicus curiae. It concerns a single issue—whether withdrawal liability payments under the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA") properly include "first year" interest, *i.e.*, interest for the year between the date as of which the employer's share of the plan's un-

funded liability is valued and the date withdrawal liability payments are deemed by the statute to begin.

The NCCMP believes that the statute requires the inclusion of first year interest—indeed, that nothing less will fulfill the statutory mandate that withdrawn employers pay their full share of the plan's unfunded vested benefits. It therefore agrees with the position of the Solicitor General and the Petitioner (as well as the Court of Appeals for the Third Circuit) and disagrees with the decisions of the Seventh and Fourth Circuits that MPPAA does not authorize the assessment of first year interest.[1]

The NCCMP is a nonprofit, tax-exempt organization established shortly after Congress enacted ERISA in 1974. Its affiliates consist of more than 240 multiemployer pension and welfare plans, or their sponsors. On behalf of its affiliated plans, and the approximately nine million participants and beneficiaries of multiemployer plans generally, the NCCMP is entirely engaged in monitoring the development—legislative, administrative and judicial—of the laws relating to the structuring and administration of multiemployer pension and welfare plans. The NCCMP

[1] *Compare Huber* v. *Casablanca Industries, Inc.*, 916 F.2d 85 (3d Cir. 1990), *cert. dismissed*, 113 S.Ct. 1070 (1993) (*"Huber"*) *with Jos. Schlitz Brewing Co.* v. *Milwaukee Brewery Workers' Pension Plan*, 3 F.3d 994 (7th Cir. 1993) (*"Schlitz"*) and *Borden, Inc.* v. *Bakery & Confectionery Union & Industry Int'l Pension*, 974 F.2d 528 (4th Cir. 1992) (*"Borden"*). In addition to the conflict among the circuits, a number of arbitration decisions have reached a conclusion different from that of the decision below. *See Du Art & Technicolor* v. *Motion Picture Laboratory Technicians Local 702 Pension Fund*, 10 EBC 1317 (O'Loughlin Arb. 1987), *affirmed in part, remanded in part*, 10 EBC 1326 (S.D.N.Y. 1988); *Loomis Armored, Inc.* v. *Central States Pension Fund*, 8 EBC 1899 (Tilove Arb. 1987); *Seaboard Lumber Co. and Board of Trustees of the Western Council LPIW-Timber Operators Pension Trust Fund*, AAA No. 75-621-0001—86-MEPP (Byrholdt Arb. 1986); *Anchor Supply Co. and Western Pennsylvania Teamsters and Employers Pension Fund*, AAA No. 55-621-0010-85-MEPP (Hannan Arb. 1986) (all holding that pre-demand interest may be charged for at least a portion of the period before withdrawal)

has, on a number of occasions, participated as *amicus curiae* before this Court and various Courts of Appeal.

The question of first year interest is of considerable importance to multiemployer plans generally, a community for which the NCCMP is uniquely qualified to speak. The issue of how much interest to charge a withdrawing employer must be resolved by every multiemployer plan every time it assesses withdrawal liability. For the reasons set forth below, this Court should reverse the decision of the Court of Appeals and declare that first year interest must be included in assessing withdrawal liability.

SUMMARY OF ARGUMENT

The withdrawal liability of an employer who withdraws from a multiemployer pension plan must include an assessment for "first year" interest. MPPAA provides that a portion of the unfunded vested benefits ("UVB") of such a plan is allocated to each withdrawn employer, that the portion so allocated shall be "amortized" through withdrawal liability payments, and that the first withdrawal liability payment is deemed to be made on the first day of the plan year following the year of withdrawal—one year after the date as of which the withdrawn employer's share of the plan's UVB is valued. The requirement to "amortize" such UVB clearly establishes that interest must be paid thereon, and the only way to ascribe any meaning to the provision that deems the first payment to be made on the first day of the next plan year is to assess first year interest.

This interpretation of the statute is particularly appropriate since the assessment of first year interest is consistent with standard amortization practices in which the first periodic payment on a mortgage is made at the end of the first period and interest is assessed from the beginning of that period. The decision below would require a radical departure from standard amortization and actuarial practices, and there is no indication that Congress intended any such departure.

Moreover, the assessment of first year interest is necessary to ensure that withdrawing employers pay their full, pro rata shares of the plan's UVB. The present value of such vested benefits is, under the statute, calculated as of the last day of the plan year preceding the year of withdrawal, which, of course, is before the employer withdraws and begins making withdrawal liability payments. Since the present value of such benefits will, as a result of the time value of money, inevitably grow between the initial calculation and the time payment actually begins, the withdrawn employer would pay less than its full share if interest were not assessed.

ARGUMENT

THE COURT OF APPEALS ERRED AS A MATTER OF LAW IN REFUSING TO ASSESS "FIRST YEAR" INTEREST, I.E., INTEREST FROM THE DATE THE LIABILITIES ALLOCATED TO THE WITHDRAWN EMPLOYER ARE VALUED TO THE FIRST DAY OF THE PLAN YEAR FOLLOWING THE YEAR OF WITHDRAWAL.

Although the precise scope of its holding is somewhat unclear,[2] the Court of Appeals apparently held that Respondents were not required to pay interest from the "calculation date" of their withdrawal liability (the last day of the plan year preceding the plan year of withdrawal)[3] to the date the statute deems payment of such

[2] The Court of Appeals reversed the district court's decision "to the extent it requires Schlitz to pay interest for 1981," *Schlitz*, 3 F.2d at 1004, thereby seeming to indicate that no interest could be assessed for any part of the year of withdrawal. However, it also stated that "MPPAA does not authorize the assessment of interest before an employer's obligation to pay arises," *id.*, thereby suggesting that interest might be properly assessed for the period following an employer's withdrawal.

[3] ERISA § 4211(b)(2)(A), 29 U.S.C. § 1391(b)(2)(A). (Section references herein are to the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1001 *et seq.*)

liability to begin (the first day of the plan year following the plan year of withdrawal).[4] This amount, which is generally referred to as "first year interest," is assessed by most of the NCCMP's affiliates when making withdrawal liability calculations.

As discussed below, the assessment of first year interest is called for by standard actuarial and amortization practices, is required by the language of MPPAA, and is necessary to fulfill the purpose of MPPAA to require withdrawing employers to pay their full, pro rata shares of the plan's unfunded vested benefits.

A. The Assessment of First Year Interest Is Consistent With Standard Amortization Practices and Is Required by the Language of MPPAA.

The statutory imposition of withdrawal liability constitutes, in essence, an allocation to each withdrawn employer of a portion of the plan's underlying UVB. ERISA §§ 4201(b)(1), 4211. The UVB of a plan may usefully be thought of as a kind of mortgage, representing the extent to which future benefit obligations are not currently funded by the existing plan assets. This "mortgage" will eventually be paid off by the contributions of participating employers and the withdrawal liability payments of withdrawn employers. When a previously-participating employer withdraws, a portion of the UVB mortgage liability is assigned to the withdrawn employer. However, this mortgage's principal balance at any given time (and therefore the portion to be so assigned) can only be determined precisely through a complex and lengthy process called an actuarial valuation.

The statute defines UVB as an amount equal to "the value of nonforfeitable [*i.e.*, vested] benefits under the plan, less the value of the assets of the plan." ERISA § 4213(c). Valuing the plan's assets, particularly if they

[4] ERISA § 4219(c)(1)(A)(i), 29 U.S.C. § 1399(c)(1)(A)(i).

consist of cash, cash equivalents, and publicly traded stocks and bonds, is a relatively straightforward process. (Note, however, that this value will change, based, for example, on stock and bond market movement, and often will change in unpredictable fashion.)

Valuing the plan's benefit obligations is more complicated. First, one must identify such obligations. That means, for each participant in the plan, determining the amount and number of benefit payments to which such participant is entitled, and the times at which such payments will be made. For example, in a plan providing $25/month in retirement benefits for each year of service credited under the plan, participant John Doe might be age 45 with 20 years of service. He would thus already have earned a $500/month retirement benefit, commencing in 20 years when he reaches age 65. Utilizing mortality assumptions, one could then determine the age to which Mr. Doe is expected to live, say 83. One would then have identified the plan's obligation to Mr. Doe as $6,000 ($500/month x 12 months/year) in the year 2014, and $6,000/year for each succeeding year through 2032.

After identifying the plan's obligation to Mr. Doe, its value can then be determined by establishing, in effect, how much the plan would have to set aside today in order to pay the identified benefits as they came due. This is done by "discounting" the future benefit obligations to a "present value." For example, the $6,000 due Mr. Doe in 2014 would, if discounted at 7 percent for 20 years, have a present value of approximately $1,551. (Another way of looking at this is to say that $1,551 put aside today will grow, at 7 percent compound interest, to $6,000 in 20 years.) A similar calculation is then done for each of the other identified benefit payments for Mr. Doe, and for each of the payments due to each other plan participant and beneficiary. The sum of such present values for all vested benefits under the plan is "the value of nonforfeitable benefits under the plan."

A plan with cash or other assets equal to or greater than the value of its nonforfeitable benefits has no UVB *i.e.*, no "mortgage." Those assets, together with the expected earnings thereon, should be sufficient to pay all vested benefits as they come due. By contrast, a plan with total assets having a value less than the value of its nonforfeitable benefits does have UVB, and therefore has a "mortgage" that must be paid off.

Like any mortgage, the UVB of a plan, measured at any given point in time, accrues interest thereafter. If not paid down, a plan's UVB will grow as the time nears when plan benefits must be paid. In the year 2014, the $6,000 payable to Mr. Doe would have a present value of $6,000 rather than the value of $1,551 it had in 1994.

When an employer withdraws, as noted earlier, MPPAA in effect assigns that employer an allocated share of the plan's outstanding UVB "mortgage," measured as of the last valuation date, *i.e.*, the last day of the plan year preceding the year of such employer's withdrawal.[5] Just as the entire UVB mortgage accrues interest, so does this allocated share assigned to the withdrawn employer. A mortgage with a $10,000 outstanding balance, if separated into two mortgages, with $9,000 and $1,000 balances respectively, with the $1,000 piece assigned to a separate obligor, does not thereby cease accruing interest on that $1,000 piece, even for a period. And yet, as shown within, that is precisely the result reached by the Court of Appeals below.

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[5] If practical, it might well have made sense to calculate and assign this mortgage share on the date of withdrawal itself, when the employer's contributory relationship with the plan terminated. However, as shown above, calculating the mortgage balance precisely as of any given date is a complicated and expensive procedure. Congress instead mandated a simpler and more practical approach, calculating and allocating the outstanding mortgage balance as of a single day (the end of the preceding plan year) for all withdrawals within a given plan year.

The Court below also found it useful to view the liability of the withdrawn employer as a kind of loan, and, as a loan, to accrue interest from some point in time. *Schlitz*, 3 F.3d at 1004. However, the method prescribed by the Court of Appeals for repaying this "loan" is contrary to standard amortization practices, which require interest to accrue from the outset.

The most familiar amortization calculations, such as those used in the calculation of standard home mortgages, assume that the first payment occurs at the end of the first period and that interest begins to accrue from the beginning of the first period. *See Loomis Armored, Inc.* v. *Central States Pension Fund*, 8 EBC 1899, 1920-21 (Tilove Arb. 1987). For example, in the case of a ten-year second mortgage of $10,000 at 10 percent annual interest, each yearly payment would be $1627.45, the first payment would be due a year after the loan was made, and such payment would include interest for that year. The amount of the required amortization payment can be calculated with a simple financial calculator, or by using a standard amortization formula. We contend that the statute itself clearly prescribes exactly this kind of amortization calculation with respect to withdrawal liability.

The propriety of assessing first year interest turns on the interpretation of ERISA § 4219(c). That section describes in great detail how to establish an employer's withdrawal liability payment schedule over "the period of years necessary to amortize" the employer's allocated share of the plan's UVB. By using the term "amortize," the statute makes clear that interest—to account for the time value of money—must in some fashion be included in establishing the payment schedule. We submit that the language of Section 4219(c) clearly mandates the use of standard amortization practices, which require the assessment of first year interest.

As noted earlier, the principal amount of the UVB mortgage assigned to the withdrawn employer is determined as of the end of the year *preceding* the year of withdrawal, and the first payment is, under Section 4219(c), deemed to be made as of the beginning of the year *following* the year of withdrawal:

> [A]n employer shall pay the amount determined under [ERISA § 4211] . . . over the period of years necessary to amortize the amount in level annual payments . . . *calculated as if the first payment were made on the first day of the plan year following the plan year in which the withdrawal occurs* and as if each subsequent payment were made on the first day of each subsequent plan year.[6]

In other words, for purposes of establishing the amortization schedule, the statute *deems* the first payment to occur at the end of the first period, and interest, pursuant to standard amortization practices, begins to accrue from the beginning of such period, *i.e.*, the date as of which the outstanding balance on the liability was calculated.

By contrast, what the Court of Appeals ordered here is not amortization, or is at least a very strange kind of amortization, where no interest accrues during the first period of the schedule. Under its approach, the first withdrawal liability payment, although occurring some time after the balance on the UVB mortgage was determined, would thus be pure principal, with no interest component, which anyone familiar with home mortgage interest (*e.g.*, for income tax deduction purposes) knows is exactly backward. In fact, the early payments of a mortgage are often mostly interest, because that is when the principal balance is the largest.

If interest did not accrue from the beginning of the first period, the standard amortization formula could not

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[6] ERISA § 4219(c)(1)(A)(i), 29 U.S.C. § 1399(c)(1)(A)(i) (emphasis added).

be used[7] and the full principal amount would not be amortized. In the second-mortgage example set forth above, it would instead be as though approximately $1500[8] were subtracted from the principal amount at the end of the first year, with only the remaining $8500 being amortized over the nine remaining years.

Nothing in MPPAA suggests that Congress intended such an unusual result. Rather, we submit that when Congress called for the withdrawn employer's liability to be "amortized" based on annual payments and deemed the first payment to be made a year after the date as of which the UVB to be amortized is valued, the conclusion is inescapable that Congress intended for interest to accrue during that year, just as it would in the amortization of a normal mortgage.[9]

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[7] The formula to calculate the amount of a periodic payment (assuming payment at the end of the period plus interest for the period) is

$$\text{prin} \times \text{int}/(1-(\text{int}+1)^{-n})$$

where prin = the principal amount, int = the interest rate per period, and n = the number of periodic payments. This formula is the one used to calculate the factors found in standard amortization tables.

[8] The ten annual payments would each be smaller, approximately $1500 rather than the $1627.45 alluded to above, because of the failure to accrue interest during the first period.

[9] The legislative history of MPPAA has an example of a withdrawal liability calculation, in which the numbers only work if first year interest is assumed:

> For example, assume that an employer's withdrawal liability is $1 million and that the plan's valuation rate of interest is 6 percent. Assume . . . [historic contribution rates that would, under ERISA § 4219(c)(1)(C), result in annual withdrawal liability payments of] $63,750. This would result in the amortization of the liability over approximately 49 years. Because the 49-year schedule is longer than 30 years, the employer would be liable to the plan for 30 annual payments of $63,750.

[Continued]

Indeed, assessing first year interest is the only way to give meaning to the statutory requirement, quoted above, that a withdrawn employer's payment schedule be calculated "as if the first payment were made on the first day of the plan year following the plan year in which the withdrawal occurs." Under the decision of the Court of Appeals, that portion of the statute has absolutely no function.[10] If no interest accrues prior to the first payment, calculation of the amortization schedule is in no way dependent on when such first payment is deemed to occur. An interpretation depriving this language of all function is contrary to the well established canon of statutory construction that statutes should be interpreted so as to give meaning to every part of the statute. *Mountain States Tel. & Tel.* v. *Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *Reiter* v. *Sonotone*, 442 U.S. 330, 339 (1979); Sutherland Stat. Const. § 46.06 (5th ed. 1992).

This Court should not countenance an interpretation that renders this pivotal phrase nugatory. Rather, interest should be assessed from the "calculation date" through the "deemed date" of payment consistent with standard amortization practices.

B. The Assessment of First Year Interest Is Necessary To Fulfill the Purpose of MPPAA.

Assessing first year interest is not only consistent with standard amortization practices, and necessary to give effect to the statutory language regarding the deemed date

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[9] [Continued]

H.R. Rep. No. 96-869, 96th Cong., 2d Sess. 83, *reprinted in* 1980 U.S.C.C.A.N. 2918, 2951.

If no first year interest were included, the amortization schedule (apart from the 20 year cap mandated by ERISA § 4219(c)(1)(B)) would be 38 rather than 49 years. This fact is readily and simply verifiable with any financial calculator.

[10] By contrast, the decision of the Third Circuit in *Huber* recognized that the assessment of first year interest is necessary to give meaning to this portion of the statute. 916 F.2d at 97.

of payment, it is necessary to insure that the purpose of MPPAA—to require employers withdrawing from multiemployer plans to pay their full, pro rata share of the plan's UVB—is fulfilled.[11]

As noted earlier, UVB represents the difference, at a particular date, between the value of a plan's vested benefit obligations and the value of its assets. *See also Huber*, 916 F.2d at 95. Determining the value of the plan's vested benefits is a complex calculation requiring the plan to determine the future payment streams to which each participant will be entitled at retirement (making assumptions as to dates of retirement and mortality), and then discounting all of those payment streams back to a present value (using a suitable discount rate) as of the date for which UVB is to be calculated. The difference between the present value of those benefits and the value of the plan's assets at that date represents the plan's UVB. Thus, if an employer withdrew *on that date*, an *immediate* payment of its pro rata share of the UVB, without any further adjustments, would fund the eventual payment of the unfunded benefits allocated to it.

From a theoretical standpoint, it might well have been sensible for Congress to require a UVB determination on the date of each employer's withdrawal, so that such employer's share of the unfunding could be valued as of the exact moment the employer terminated its relationship with the plan.[12] (Because the value of plan assets and the

[11] The legislative history of MPPAA makes clear Congress' intent that withdrawing employers pay their full share of UVB:

> [E]mployer withdrawal liability is necessary to insure that employers that remain in the plan are not burdened with funding liabilities that should have been funded by the withdrawn employer.

126 Cong. Rec. S10,117 (1980).

[12] Even here, however, interest on the outstanding balance would properly be charged from the date of withdrawal (which would also be the date the employer's share of UVB was valued) through the date of final payment.

value of its benefit obligations change over time, UVB also changes over time.) In enacting MPPAA, however, Congress realized that this was not practical.[13] Instead, as discussed above, it provided that UVB would be calculated as of the last day of the plan year preceding the year of withdrawal, allowing plans to perform a single valuation at the end of each year.

While establishing a single calculation date eliminated the need to perform multiple valuations, simply using the plan's UVB as of that date, without any adjustment, would create another problem, namely the payment of too little withdrawal liability by any employer who withdrew after the calculation date, because the UVB used to calculate withdrawal liability would be too small. The underlying benefit obligations of the plan would have been discounted over too long a period—to a point before any payments (and therefore the earnings thereon) are received. As the Third Circuit recognized in *Huber*, a UVB calculation determines the amount necessary to fund the underlying benefits only if payment is received on the date of such calculations (or interest is charged to make up the difference):

> The unfunded vested benefits of the plan (*i.e.*, the present value of the vested benefits less that of the assets of the plan) are calculated as of the last day of the plan year preceding that in which the employer withdraws. *See* 29 U.S.C. § 1391. They represent the amount which, if contributed *on that day*, would fully fund the plan.
>
> * * * *
>
> In other words, the unfunded vested benefits calculation represents an employer's share of the amount

[13] The preparation of an actuarial valuation for a large plan with hundreds or even thousands of participating employers is a very complicated and expensive process which can take months. Many withdrawal dates may occur during a single year, with some large plans having experienced many hundreds of withdrawals during the 14 years that MPPAA has been law.

> needed for a fund to break even *as of the calculation date*. Due to the time value of money, that amount will grow between the calculation date and the withdrawal date.

916 F.2d at 95, 96 (emphasis in original).

In order to simplify the process, and to fix the actual number of payments without regard to when the plan actually demands payment, Congress explicitly deemed the first payment to occur on the first day of the plan year following the year of withdrawal.[14] Combined with the statutory requirement of level annual payments thereafter,[15] this established an ordinary annuity schedule, with the principal value determined at the end of the first plan year preceding withdrawal and annual payments deemed to be made, with interest, thereafter. First year interest is nothing more than the interest accruing on such liability during the first year of such annuity schedule.[16]

Both the Court of Appeals below and the Fourth Circuit's decision in *Borden* essentially ignored the growth in UVB due to the time value of money. Instead, they relied heavily on the simplistic contention that MPPAA, although a detailed statute, does not expressly refer to interest in this context, *i.e.*, before the plan issues a with-

[14] ERISA § 4219(c)(1)(A)(i), 29 U.S.C. § 1399(c)(1)(A)(i).

[15] *Id.*

[16] Of course, some employers will begin paying their withdrawal liability before the "deemed date of payment," while others will begin payment after it. While this may result in some employers (*i.e.*, those who pay early) paying more than their share of the interest necessary to fund the UVB fully, while later payers will pay less than necessary, these sorts of trade-offs are inevitable when Congress fixes a single date for making the calculation. It obviously determined that the payment by all withdrawn employers of one year of interest would be sufficient to solve the problem created by the fact that payment will be made after the calculation date. As the Third Circuit recognized in *Huber*, because of the practical considerations involved, "Congress was interested in rough equity, not precision." 916 F.2d at 99.

drawal liability demand.[17] Neither, however, does the statute expressly refer to interest *after* withdrawal liability is demanded. Yet no one, certainly none of the parties below, contends that the withdrawal liability payment schedule established by the statute must ignore interest altogether. Any such contention would clearly fly in the face of the statute.[18] Section 4219(c)(1)(A)(i) requires an employer to pay for its share of UVB over the period of years "necessary to amortize" such share. The concept of interest is intrinsic in the common, everyday meaning of the word "amortize."[19]

Moreover, the concept of interest is intrinsic to the calculation of UVB, which is itself the starting point for withdrawal liability calculations. As discussed above, one essential step in calculating UVB is determining the present value of the plan's future benefit payments. This requires the use of a discount rate to determine the amount of money that, if paid to the plan at the calculation date, would be sufficient to fund those benefits. In effect, the discount rate is the functional equivalent of interest. A discount rate converts the future value of benefit payments into a present value, and interest converts a present value into the future value of benefit payments.

Discounting the value of plan benefits back to a single valuation date—which in every case will be prior to the date of withdrawal, and prior to the date any withdrawal

[17] *See Schlitz*, 3 F.3d at 1004; *Borden*, 974 F.2d at 536. As noted above, however, this argument simply reads out of the statute the requirement that withdrawal liability shall be "calculated as if the first payment were made on the first day of the plan year following the plan year in which withdrawal occurs."

[18] *See e.g.*, ERISA §§ 4219(c)(1)(A)(ii) and 4219(c)(6), which set forth the interest rate to be used in establishing the withdrawn employer's payment schedule.

[19] For example, Black's Law Dictionary defines "amortization" as "[a] reduction in a debt or fund by periodic payments covering interest and a part of principal." Black's Law Dictionary, 83 (6th ed. 1990).

liability payments are made—avoids the need to perform a new valuation every time an employer withdraws. Nonetheless, for the reasons discussed above, it effectively discounts the value of those benefits too far back in time, to a date when no payment has been set aside on which earnings can be assumed. The "charging" of first year interest, taking the discounted amount back to the deemed date of payment, is thus really nothing more than a simple way of trying to calculate UVB as of the appropriate time without the need to conduct as many as 365 full scale actuarial valuations of the plan each year.

C. The Statute Provides No Basis for Suspending Interest from the Time UVB Is Determined Until Date of Withdrawal.

Although the Court below declined to assess interest from the calculation date, it indicated that an assessment of interest beginning on the date of withdrawal might be appropriate, supposedly because that is the date the withdrawn employer's liability arises.[20] *Schlitz*, 3 F.3d at 1004. However, this date is not so specified, or even referred to, in ERISA § 4219(c)(1)(A)(i). It is not in fact the date the underlying plan liability (as opposed to the obligation to pay withdrawal liability) arises, and it is not the correct date to use from an economic standpoint under the framework of the statute.

Under MPPAA the date of withdrawal (apart from establishing the plan year in which withdrawal occurs) is not relevant to establishing the withdrawal liability pay-

[20] In this regard, we note that the decision below disagreed with the decision of the Third Circuit in *Huber* to the extent it held that interest could be assessed for the period between the calculation date and the date of withdrawal, although it observed that "[w]hether *Huber* actually holds such a thing is doubtful." *Schlitz*, 3 F.3d at 1004. This comment is mystifying. The Third Circuit was absolutely clear in *Huber* that a full year's interest must be assessed. *See Huber*, 916 F.2d at 95 ("The Language of the Statute clearly compels the imposition of First Year Interest. . . .").

ment schedule. The statute does not value or allocate unfunded vested benefits as of such date. Rather, as discussed above, the logical date from which interest should accrue is the date as of which the UVB to be allocated to the withdrawn employer has been measured.

The discussion by the Court of Appeals regarding the possibility of assessing interest from the date of withdrawal demonstrates that that Court fundamentally misapprehended the obligation of employers to fund the UVB of multiemployer plans. In concluding that interest should not be assessed from the calculation date, the Court stated that "MPPAA does not imply that withdrawing employees *owe* anything as of the end of the year before they drop out" and that the withdrawn employer "was not liable for a penny until it withdrew from the Plan and received a notice of liability." *Schlitz*, 3 F.3d at 1004 (emphasis in original). These statements are not correct. The fact is that employers *do* have a liability for the plan's UVB before they withdraw.

Under the minimum funding requirements of ERISA, employer contributions must be sufficient (1) to pay for currently accruing benefits, and (2) to fund, over time, the plan's UVB.[21] Thus, even before withdrawing, an employer is liable, and must make payments, for its share of the plan's UVB.[22] The Third Circuit recognized this fact in *Huber*:

[21] *See* ERISA § 302, 29 U.S.C. § 1082. The statute provides that the plan's unfunded past service liability must generally be amortized over thirty years.

[22] One might argue that contributions made during part of the year of withdrawal (*i.e.*, prior to the withdrawal date) somehow cancel or otherwise offset the time-value growth in the employer's share of UVB. In some cases, such a theoretical offset of the interest accrual may actually occur. However, contributions (which tend to reduce UVB) are only one factor to be taken into account. For example, the service on which the employer contributes during the year of withdrawal may earn additional benefits for

[Continued]

> [W]hile the liability for unfunded vested benefits became accelerated on the date the employer withdrew, it did not magically appear on that date. . . . "[T]he liability for UVBs represents a pre-existing obligation on the employer's part, and is not simply 'incurred' as of the date of withdrawal."

916 F.2d at 96 (citation omitted).

Thus, contrary to the suggestion of the Court of Appeals below, there is no reason to assess interest beginning with the date of withdrawal. Rather, since the employer's obligation to pay off its share of the plan's UVB has existed all along, interest should be assessed beginning on the date as of which the obligation was calculated. Such an approach is not only mandated by the statute, it matches economic reality and comports with common borrowing experience, where a liability is determined as of a particular time and bears interest on the outstanding principal balance from that point until the time paid.

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[22] [Continued]
its workers, thereby tending to *increase* UVB. A similar result would obtain from a decrease in the market value of plan assets or unfavorable actuarial experience (*e.g.*, retirees living longer than expected). Whether the net of these factors is a plus or a minus cannot accurately be determined without an actuarial valuation. As noted above, Congress rejected this approach in favor of the more practical, and easily administrable, single annual valuation.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Seventh Circuit with respect to the issue of first year interest should be reversed.

Respectfully submitted,

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